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No. 84-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAYDEN B. RENWICK,

Petitioner,

v.

THE NEWS AND OBSERVER PUBLISHING COMPANY, d/b/a THE RALEIGH TIMES AND GREENSBORO NEWS COMPANY, d/b/a GREENSBORO DAILY NEWS AND RECORD,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the issues presented in this Petition were raised previously in any of the courts below.

2. Whether the decision below rests entirely on adequate and independent state grounds.

3. Whether the issues raised in this Petition even present a question of constitutional law.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the North Carolina Supreme Court (Pet. App. 123-77) is reported at 310 N.C. 312, 312 S.E.2d 405 (1984). The Order of the North Carolina Supreme Court denying petitioner's Petition for Rehearing (Pet. App. 178) is unreported. The opinion of the North Carolina Court of Appeals (Pet. App. 1-122) is reported at 63 N.C. App. 200, 304 S.E.2d 593 (1983).

JURISDICTION

The judgment of the North Carolina Supreme Court was entered on 6 March 1984. A petition for rehearing was denied on 30 April 1984. (Pet. App. 178). The petition

for a writ of certiorari was filed on 30 July 1984. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). For reasons set forth below, respondents do not believe that petitioner has properly invoked the jurisdiction of this Court.

STATEMENT OF THE CASE

Petitioner, Hayden B. Renwick, claims that respondent News and Observer Publishing Company[1] published an editorial that made false statements about him that were libelous *per se* and that publication of these allegedly false statements invaded his privacy by placing him in a false light before the public.[2] In a separate action against respondent Greensboro News Company,[3] petitioner asserted the same claims arising out of a republication of the editorial originally published by respondent News and Observer Publishing Company.[4]

Respondents' motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure were

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[1] For purposes of complying with Rule 28.1 of the Supreme Court Rules, the respondent News and Observer Publishing Company does not have a parent company, nor does it have any non-wholly owned subsidiaries.

[2] The entire text of the editorial in question, published in the *Raleigh Times* on 22 April 1981, appears in the North Carolina Supreme Court's opinion in this case. (Pet. App. 125-27).

[3] For purposes of complying with Rule 28.1 of the Supreme Court Rules, the parent company of the respondent Greensboro News Company is Landmark Communications, Inc., and respondent Greensboro News Company does not have any non-wholly owned subsidiaries.

[4] The same editorial was reprinted on 26 April 1981 in the Greensboro Daily News and Record in a commentary section entitled "Around the State." (Pet. App. 125).

granted by the trial court on 22 February 1982.[5] A divided panel of the North Carolina Court of Appeals reversed the trial court's decision on 5 July 1983. Respondents then petitioned the North Carolina Supreme Court for review of the Court of Appeals' decision, which petition was granted. The North Carolina Supreme Court reversed the Court of Appeals' decision on 6 March 1984 and ordered that the cases be remanded for reinstatement of the judgments entered by the trial court, dismissing petitioner's complaints for failure to state a claim for relief for libel *per se* under state law and also refusing to recognize a cause of action for false light invasion of privacy. (Pet. App. 123-77).

SUMMARY OF ARGUMENT

Respondents, News and Observer Publishing Company and Greensboro News Company, respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of North Carolina in this case. Although petitioner, Hayden B. Renwick, asserts that "[t]he jurisdiction of this Court to review the decision of the Supreme Court of North Carolina is conferred by Title 28, United States Code, Section 1257(3)" (Pet. 3), such is not the case. The North Carolina Supreme Court's decision in this case does not involve a state statute of "any title, right, privilege or immunity" of petitioner "specially set up or claimed under the Constitution" of the United States. Thus, this Court does not have jurisdiction of the case. This case does not involve a federal question because it rests entirely and adequately on state grounds. Moreover, the questions presented in the petition were never

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[5] These actions were consolidated for purposes of appeal by order of the trial court.

raised or decided at any previous point in this proceeding and are without merit.

ARGUMENT

I. Petitioner Never Raised The Questions Presented In His Petition Before Presenting Them To This Court, Nor Were These Questions Decided Previously In This Proceeding.

The two questions presented by petitioner for consideration by this Court are:

> (1) Whether a citizen forfeits an interest protected by the First and Seventh Amendments of the United States Constitution, that is, the interest to plead and disprove a published falsehood before a jury, where, as here, defendants have published or republished false factual statements reasonably susceptible of a defamatory meaning which, by judge alone, have been determined not to be libelous.
>
> (2) Whether a plaintiff injured in his reputation, professional standing, or is otherwise shamed or ridiculed has a legally protected interest under the free speech clause of the First Amendment to prosecute a claim against another where defendant gives publicity to a matter concerning plaintiff that places plaintiff before the public in a false light by the utterance of a misrepresentation of a person's statements, character, history, activities or beliefs; and denies plaintiff due process, as here, where his claim has been dismissed.

(Pet. 3-5).

Petitioner never raised nor were either of the above questions decided by the North Carolina Supreme Court, the North Carolina Court of Appeals, or the trial court below. For this very reason the petition in this case fails to "specify the state proceeding . . . at which the questions sought to be reviewed were raised," as required by Rule 15.1(g) of the Supreme Court Rules. Likewise, a

review of the opinions in this case by the North Carolina Court of Appeals and the North Carolina Supreme Court reveals that these questions were never presented nor decided at any prior stage in this proceeding. (Pet. App. 1-177). Indeed, the only constitutional arguments raised below in this case were those concerning *respondents'* First Amendment rights. As this Court has held on several occasions, it "cannot decide an issue raised for the first time here." *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973). *See also, Webb* v. *Webb*, 451 U.S. 493, 498-99 (1981); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969).

II. The Decision Below Rests Entirely On Adequate And Independent State Grounds.

A reading of the opinion by the North Carolina Supreme Court in this case demonstrates that its decision rests entirely and adequately on North Carolina tort law.[6]

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[6] Petitioner states that "[i]n a 4-3 decision, the North Carolina Court of Appeals was reversed by the Supreme Court of North Carolina on March 6, 1984." (Pet. 8). This characterization of the vote as a 4 to 3 decision is only technically correct. The vote is more accurately described as a 5 to 2 decision. Four members of the court—Chief Justice Branch and Justices Copeland, Mitchell and Martin—joined in the majority opinion, which dismissed petitioner's complaints for failure to state a claim for libel *per se* under state law and also refused to recognize a new cause of action for false light invasion of privacy. (Pet. App. 123-60). In a separate opinion, Justice Exum concurred with the majority in its decision to refuse to recognize a cause of action for false light invasion of privacy; he dissented only from the majority's decision to dismiss petitioner's complaints for failure to state a claim for relief for libel *per se*. (Pet. App. 161-64). In a second, separate opinion, Justice Meyer concurred with the majority in its decision to dismiss petitioner's complaints for failure to state a claim for relief for libel *per se;* he dissented only from the majority's decision to refuse to recognize a cause of action for false light invasion of privacy. (Pet. App. 165-75). Justice Frye alone dissented from both of the court's determinations. (Pet. App. 176-77). Thus, on each of the two determinations rendered, five justices agreed and only two justices dissented.

The North Carolina Supreme Court began its analysis of this case with the observation that "[t]hree classes of libel are recognized under North Carolina law." (Pet. App. 129). Quoting from *Arnold* v. *Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979), the court identified those three classes as: (1) libel *per se;* (2) publications susceptible of two interpretations, one of which is defamatory and the other which is not; and (3) libel *per quod.* (Pet. App. 129-30). After relying upon its previous decision in *Flake* v. *Greensboro News Co.*, 212 N.C. 780, 785, 195 S.E. 55 59 (1938), to explain the essential elements of each of the three classes of libel, the court succinctly analyzed petitioner's complaints:

> The plaintiff's complaints in these cases failed to bring the editorial complained of within the second class of libel, since it was not alleged that the editorial is susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made. *Id.; Wright* v. *Commercial Credit Company, Inc.*, 212 N.C. 87, 89, 192 S.E. 844, 845 (1937). ... The complaints failed to bring the editorial within the third class—libel *per quod*—since it was not alleged that the plaintiff suffered special damages. *Flake* v. *Greensboro News Co.*, 212 N.C. at 785, 195 S.E. at 59. In fact, the plaintiff's counsel stated with commendable candor and accuracy during oral arguments before this Court that these were actions for libel *per se* or not actions for libel at all. Therefore, we are concerned here only with the law relative to libel *per se*. We must determine whether the editorial is defamatory *per se*. If it is not, the defendants were entitled to judgments ordering dismissal of the plaintiff's claims for relief for libel. *Id.*

(Pet. App. 131-32).

Before holding that petitioner's complaints did not state a claim for relief for libel *per se*, the court set forth the state law standard that the complaints had to meet to survive a motion to dismiss:

> "[D]efamatory words to be libelous *per se* must be susceptible of *but one meaning* and of such nature that *the court* can presume *as a matter of law* that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake* v. *Greensboro News Co.*, 212 N.C. at 786, 195 S.E.2d at 50.

(Pet. App. 134-35) (emphasis added). Because the editorial about which petitioner complained did not meet the foregoing test, the court held that the trial court properly granted respondents' motions to dismiss the complaints. (Pet. App. 160). In short, the North Carolina Supreme Court's analysis of the complaints and the determination that they were inadequate rests *solely* upon petitioner's failure to satisfy the North Carolina state law standard for a cause of action for libel *per se*. Although petitioner argues against the use of this standard, the decision whether to continue to apply it is a question of state law, not federal constitutional law. *See, e.g., Agins* v. *City of Tiburon*, 447 U.S. 255, 259-60 n.6 (1980).

In the second part of its opinion, the North Carolina Supreme Court refused to extend North Carolina tort law to include a claim for relief recognized in some other jurisdictions—false light invasion of privacy. Clearly, it is well within the perogative of the highest court of any state to decline to fashion a new claim for relief. Indeed, one of the most critical roles of the court of highest authority in any state is to define the common law of the state for its citizens.

The Supreme Court of the United States lacks jurisdiction to review cases such as the present action that involve only state law questions. This "Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). *See also*, *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960).

III. The Questions Presented In This Petition Are Meritless.

Even assuming *arguendo* that petitioner properly raised in the courts below the questions presented to this Court, his petition should be denied because these questions are meritless. Petitioner argues that because Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (the language of which is identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure), permits a judge to determine whether a complaint states a claim for relief for libel *per se*, petitioner was denied his right to trial by jury under the Seventh Amendment and his right of free speech under the First Amendment when his claim was dismissed. In essence, petitioner contends that any time an action is brought for libel *per se*, a trial court may not test the sufficiency of the complaint under the articulated standard prescribed by state law for libel *per se* actions. Instead, a full jury trial must be conducted. This argument is patently without merit. As this Court held in *Agins* v. *City of Tiburon*, 447 U.S. 255, 259-60 n.6 (1980), an objection by a petitioner "to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court."

Petitioner also argues that the North Carolina Supreme Court's refusal to extend North Carolina tort law to include false light invasion of privacy as a new claim for

relief violates his First Amendment right of freedom of speech. In support of this argument, petitioner cites cases from other jurisdictions that have recognized a cause of action for false light invasion of privacy. Clearly, petitioner has no constitutional right to compel North Carolina to recognize a new tort claim simply because some courts in some other jurisdictions have done so.

Finally, it is this Court's duty to enforce against the states only those portions of the Bill of Rights that apply to the states through the Fourteenth Amendment. *Twining* v. *New Jersey*, 211 U.S. 78 (1908), *overruled on other grounds*, *Malloy* v. *Hogan*, 378 U.S. 1 (1964). It should declare unconstitutional only those portions of state libel law that conflict with the Constitution. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 276-77 (1964); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945). Although petitioner maintains his Seventh Amendment right has been violated, the Seventh Amendment does not apply to the states through the Fourteenth Amendment. *New York Central R. R. Co.* v. *White*, 243 U.S. 188, 208 (1917). Further, petitioner's First Amendment rights are not violated when a state court continues to apply a particular legal standard a complaint must meet to survive a motion to dismiss or refuses to recognize a new claim for relief. *Agins* v. *City of Tiburon*, 447 U.S. 255, 259-60 n.6 (1980).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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